

No. 7003

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United States <sup>5</sup>  
Circuit Court of Appeals  
For the Ninth Circuit

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CLARENCE W. MORRIS,  
Appellant,

vs.

HARRY L. HUSSMAN and CAROLINE HUSS-  
MAN,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division.

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FILED  
MAY 6 - 1933  
PAUL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals  
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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

|   | Page |
|---|------|
| Answer to Complaint .....                               | 12   |
| Agreed Statement of Facts .....                         | 18   |
| Assignment of Errors .....                              | 55   |
| Complaint .....   | 1    |
| Clerk's Certificate .....                               | 61   |
| Citation .....  | 62   |
| Demurrer to Complaint .....                             | 9    |
| Judgment .....  | 52   |
| Order Overruling Demurrer, dated July 24,<br>1931 ..... | 12   |
| Order Allowing Appeal .....                             | 54   |
| Petition for Order Allowing Appeal.....                 | 53   |
| Praecipe .....  | 60   |
| Undertaking for Costs .....                             | 57   |



NAMES AND ADDRESSES OF ATTORNEYS.

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San Francisco, Calif.,

Attorneys for Plaintiffs and Appellees.



In the Southern Division of the District Court of  
the United States, for the Northern District of  
California.

No. 18,975-L

HARRY L. HUSSMAN and

CAROLINE HUSSMAN,

Plaintiffs,

vs.

CHESTER A. MORRIS and

CLARENCE W. MORRIS,

Defendants.

COMPLAINT ON CONTRACT.

Plaintiffs complain of defendants and for cause of  
action allege:

## I.

At all times herein mentioned each of the plaintiffs was and is now a citizen and resident of the State of Texas.

## II.

At all times herein mentioned each of the defendants Chester A. Morris and Clarence W. Morris was and is now a citizen of the State of California and a resident of the Southern Division of the Northern District thereof.

## III.

This is a suit of civil nature at common law, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000.), and is between citizens of different states.

## IV.

At all times herein mentioned plaintiffs were and are now the owners of those certain lots, pieces or parcels of land situate, lying and being in the City and County of San Francisco, State of California, and more particularly described as follows, to-wit: [1]\*

Lots twenty (20), twenty-one (21), twenty-two (22) and twenty-three (23), Block 3012, West Portal Park, according to map thereof recorded in the office of the Recorder of the City and County of San Francisco, State of California.

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.



## V.

On or about November 1, 1930, plaintiff Harry L. Hussman and defendant Chester A. Morris entered into a certain lease, copy of which is hereto attached and marked Exhibit "A" and which is hereby referred to and made a part hereof the same as if herein set out at length.

## VI.

Defendant Chester A. Morris entered into a written contract dated October 18, 1929, with Barrett & Hilp, contractors, for the construction of a miniature golf course on said premises and said Chester A. Morris agreed to pay to Barrett & Hilp therefor the sum of five hundred dollars (\$500.) plus the cost of labor and material and said defendant further agreed to pay the whole of said sum within seventy (70) days after completion of said golf course. By a written endorsement on said contract executed contemporaneously therewith defendant Clarence W. Morris guaranteed the payment of any balance due said Barrett & Hilp and agreed to pay the same within seventy (70) days after completion of said golf course. In accordance with the terms of said contract said Barrett & Hilp erected a miniature golf course on the above described property and there became due and owing to said Barrett & Hilp from defendants the sum of five thousand six hundred forty-one and 84/100 dollars (\$5,641.84). Defendants failed and refused to pay any part of said contract price except the sum of one thousand two

hundred fifty dollars (\$1,250.), leaving a balance of four thousand three hundred ninety-one and 84/100 dollars (\$4,391.84). Thereafter, within the time allowed by law, and on or about February 6, 1931, said Barrett & Hilp recorded in the office of the recorder of the City and County of San Francisco its claim of lien against the above described real property, which notice contained a statement of the demand of said Barrett & Hilp after deduction of just credits and offsets, the name of [2] the owner of the property, a general statement of the kind of work done and materials furnished, the name of the person by whom said Barrett & Hilp was employed and the names of the persons to whom the materials were furnished, a description of the property sought to be charged with the lien sufficient for identification, which claim of lien was verified by oath of J. F. Barrett, one of the partners of said Barrett & Hilp. Thereafter, and on March 17, 1931, said Barrett & Hilp filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, for foreclosure of its said lien against said real property and for the recovery of any deficiency, together with interest and costs from the defendants therein, namely, the sum of four thousand three hundred ninety-one and 84/100 dollars (\$4,391.84). Said action was numbered 226,541 in the records of said court.

## VII.

Defendants at all times failed and refused to pay any part of said sum of four thousand three hundred ninety-one and 84/100 dollars (\$4,391.84) and plaintiffs on or about April 13, 1931, for the sole purpose of protecting their property against foreclosure of said lien paid said Barrett & Hilp said sum of four thousand three hundred ninety-one and 84/100 dollars (\$4,391.84).

## VIII.

By reason of the premises and on or about April 13, 1931, the said sum of four thousand three hundred ninety-one and 84/100 (\$4,391.84) became, ever since has been, and now is, due and owing from defendants to plaintiffs. No part of said sum has been paid.

And for a second and separate cause of action against said defendants, plaintiffs allege:

## I.

Plaintiffs hereby refer to and repeat and make a part hereof, the same as if herein set forth at length each and all of the allegations of paragraphs I, II, III, IV, V and VI of the first cause of action. [3]

## II.

On or about the 13th day of April, 1931, Barrett & Hilp, by an instrument in writing, duly transferred, assigned and set over to plaintiffs for and

in consideration of said sum of four thousand three hundred ninety-one and  $84/100$  dollars (\$4,391.84) all their right, title and interest in and to their contract with Chester A. Morris and Clarence W. Morris and sums owing thereunder.

### III.

By reason of the premises, and on or about April 13, 1931, the sum of four thousand three hundred ninety-one and  $84/100$  dollars (\$4,391.84) became, ever since has been and now is due, owing and unpaid from said defendants to said plaintiffs. No part of said sum has been paid.

Wherefore, plaintiffs pray judgment against defendants in the sum of four thousand three hundred ninety-one and  $84/100$  dollars (\$4,391.84), together with interest thereon at the rate of 7% per annum from April 13, 1931, until paid, and for their costs of suit.

PILLSBURY, MADISON & SUTRO,  
Attorneys for Plaintiff.

State of California,  
City and County of San Francisco.—ss.

John A. Sutro, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiffs in the above entitled action; that affiant has his office in the City and County of San Francisco, in said Northern District of California and that plaintiffs are absent from said District, and for that reason affiant makes this affidavit for and on behalf

of said plaintiffs; that affiant has read the foregoing complaint on contract and knows the contents thereof and that the same is true of his own knowledge except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JOHN A. SUTRO, [4]

Subscribed and sworn to before me this 4th day of June, 1931.

[Notarial Seal]

FRANK L. OWEN,  
Notary Public in and for the City and County  
of San Francisco, State of California. [5]

EXHIBIT "A".

San Francisco, California,  
November 1st, 1930.

Receipt from Chester A. Morris of the sum of one hundred and no/100 (\$100.00) dollars, is hereby acknowledged, said sum being deposited as evidence of good faith on his part to lease the following described property under conditions as set forth below:

1. Property leased to be the vacant lots Nos. 20-21-22-23, Block 3012, West Portal Park, East line of West Portal 50' South of 14th Avenue, approximate size 200' x 90', said lot to be used for a miniature golf course, with privilege of serving refreshments in conjunction with same.

2. The rental of said premises to start November 30th, 1930.

3. The rental is to be \$100.00 monthly payable in advance for a term of one (1) year with the privilege of two (2) years more at the same rental.

4. On the signing of the lease the tenant shall pay \$100.00 additional, said sum to apply as rent for the last month of the term of this lease, it being understood that the \$100.00 first herein referred to is to apply on the first month's rent herein.

5. In the event that a permit to operate a miniature golf course as above referred to cannot be obtained from the duly constituted authorities then and in that event this agreement is void and the sum of \$100.00 first above referred to is to be returned to the lessee herein.

6. At any time after the expiration of the first year of this lease provided that the landlord or lessor herein sells the property herein described or desires to build upon the same but for no other reason this lease may be cancelled upon a six (6) months notice to the lessee to that effect, of his intention to so sell or build. It being expressly understood that in no event can the landlord or lessor **cause** the tenant or lessee to vacate the premises for the purpose of leasing or renting the same to any other person or persons to conduct a business of like nature thereon.

7. It is understood that the tenant or lessee herein is to have the privilege of transferring this lease to any equally financial tenant or lessee for the purpose of conducting the same line of business.

8. It is further understood and agreed that in the event that said lease herein is cancelled by the landlord or lessor that the and in that event the lessee or tenant may have the right to remove from said premises all materials and supplies of every kind and character placed thereon.

9. It is further understood and agreed that in the event of the passage of any law whether it be Municipal, State or Federal which will seriously interfere or hamper the conduct of a miniature golf course on said premises that then and in that event this lease is null and void at the option of the tenant or lessee.

CHESTER A. MORRIS.

\$100.00 deposit received.

DAVIS & DUNN,

By.....

Approved:

HARRY L. HUSSMAN,

Lessor.

[Endorsed]: Filed June 4, 1931. [6]



[Title of Court and Cause.]

DEMURRER OF DEFENDANT CLARENCE  
W. MORRIS

Now comes the defendant, Clarence W. Morris, and demurs to complaint of plaintiffs on file herein and for grounds of demurrer specifies the following:

## I.

That said first cause of action of said complaint does not state facts sufficient to constitute a cause of action against said defendant.

## II.

That there is a misjoinder of parties defendants.

## III.

That said first cause of action of said complaint is uncertain in this that it does not appear therein nor can it be ascertained therefrom whether or not the alleged guarantee of this defendant was accepted and relied upon by plaintiffs or plaintiff' assignor.

## IV.

That said first cause of action of said complaint is unintelligent in the particular above set forth as a particular of uncertainty.

## V.

That said first cause of action of said complaint is ambiguous in the particular above set forth as a particular of uncertainty.

## VI.

That said second cause of action of said complaint does not [7] state facts sufficient to constitute a cause of action against said defendant.



VII.

That there is a misjoinder of parties defendants.

VIII.

That said second cause of action of said complaint is uncertain in this that it does not appear therein nor can it be ascertained therefrom whether or not the alleged guarantee of this defendant was accepted and relied upon by plaintiffs or plaintiffs' assignor.

IX.

That said second cause of action of said complaint is unintelligent in the particular above set forth as a particular of uncertainty.

X.

That said second cause of action of said complaint is ambiguous in the particular above set forth as a particular of uncertainty.

WHEREFORE, defendant prays judgment of this Court for his costs incurred herein.

J. A. MUELLER,  
Attorney for Defendant.

The undersigned hereby certifies that the foregoing demurrer is not filed for purposes of delay and is in his opinion well taken in point of law.

J. A. MUELLER.

Receipt of a copy of the within demurrer is admitted this 9th day of July, 1931.

PILLSBURY, MADISON & SUTRO,  
Attorneys for Plf.

[Endorsed]: Filed July 10, 1931. [8]

[Title of Court and Cause.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 24th day of July, in the year of our Lord one thousand nine hundred and thirty-one.

Present: the Honorable HAROLD LOUDERBACK, District Judge.

Defendant's demurrer to the complaint having been heretofore submitted, now being fully considered, it is ordered that the said demurrer be and the same is hereby overruled and defendant be granted ten (10) days within which to file his answer. [9]

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[Title of Court and Cause.]

ANSWER OF DEFENDANT CLARENCE  
W. MORRIS.

Now comes Clarence W. Morris, one of the defendants in the above entitled action, and answering the complaint on file herein admits, denies and alleges, as follows:

I.

Said defendant has not sufficient information or belief upon the subject to enable him to answer the allegations contained in Paragraph I of said complaint, and basing his denial upon lack of informa-

tion or belief, denies that at all times herein mentioned said plaintiffs, or either of them, were or now are citizens and residents of the State of Texas.

II.

Said defendant admits the allegations contained in Paragraph II of said complaint.

III.

Answering Paragraph III of said complaint, said defendant alleges that he has not sufficient information or belief upon the subject to enable him to answer the allegations contained in said Paragraph and basing his denial upon said lack of information or belief, denies that this is a suit of civil nature at common law, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000.00) Dollars, and is between citizens of different states.

IV.

Said defendant has not sufficient information or belief upon the subject to enable him to answer the allegations contained in Paragraph IV of said complaint, and basing his denial upon [10] said lack of information or belief, denies that the said plaintiffs, and/or either of them, now are the owners of those certain lots, pieces or parcels of land, situate, lying and being in the City and County of San Francisco, State of California, and described in said complaint.

## V.

Said defendant admits the allegations contained in Paragraph V of said complaint.

## VI.

Said defendant admits that said defendant Chester A. Morris entered into a written contract dated October 18, 1930, with Barrett & Hilp, contractors, for the construction of a miniature golf course on said premises for the sum of Five Hundred (\$500.00) Dollars, plus the cost of labor and materials. Said defendant further agreed to pay the whole of said sum within seventy (70) days after completion of said miniature golf course. Said defendant admits by a written endorsement of said contract executed contemporaneously therewith, said Clarence W. Morris guaranteed the payment of any balance due said Barrett & Hilp, and agreed to pay the same within seventy (70) days after the completion of said miniature golf course. That said defendant has not sufficient knowledge upon the subject sufficient to enable him to answer the remaining portion of Paragraph VI of said complaint, and basing his denial upon said lack of information or belief, denies that in accordance with the terms of said contract with said Barrett & Hilp that said Barrett & Hilp erected a miniature golf course on the property described in said complaint. Denies that there became due and owing, or due or owing, to said Barrett & Hilp from said defendants, or

either of them, the sum of Fifty-six Hundred Forty-one and 84/100ths (\$5641.84) Dollars, or any other sum, or at all. Admits that thereafter, within the time allowed by law, and on or about February 6, 1931, said Barrett & Hilp recorded in the office of the Recorder of the City and County of San Francisco its claim of lien against the above described real [11] property, which notice contained a statement of the demand of said Barrett & Hilp after deduction of just credits and offsets, the name of the owner of the property, a general statement of the kind of work done and materials furnished, the name of the person by whom said Barrett & Hilp was employed and the names of the persons to whom the materials were furnished, a description of the property sought to be charged with the lien sufficient for identification, which claim of lien was verified by oath of J. F. Barrett, one of the partners of said Barrett & Hilp. That thereafter, and on March 17, 1931, said Barrett & Hilp filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, for foreclosure of its said lien against said real property and for the recovery of any deficiency, together with interest and costs from the defendants therein, namely, the sum of Four Thousand Three Hundred Ninety-one and 84/100th (\$4,391.84) Dollars. That said action was numbered 226,541 in the records of said court.

## VII.

Answering the allegations of Paragraph VII of said complaint defendant admits that he failed and refused, or failed or refused, to pay any part of said sum of Four Thousand Three Hundred Ninety-one and 84/100ths (\$4,391.84) Dollars, but in this connection avers the fact to be that no part of said sum is due or owing or unpaid to plaintiffs from this defendant. Defendant admits that on the 13th day of April, 1931, plaintiffs paid to said Barrett & Hilp the sum of Four Thousand Three Hundred Ninety-one and 84/100ths (\$4391.84) Dollars, but denies said payment was made for the sole purpose of protecting their property against the foreclosure of said lien of Barret & Hilp.

## VIII.

Answering the allegations contained in Paragraph VIII of said complaint, said defendant denies that by reason of the alleged premises, or any other reason, and/or on or about April 13, 1931, or any other time or at all, the said sum of Four Thousand [12] Three Hundred Ninety-one and 84/100ths (\$4391.84) Dollars, or any other sum, became, ever since has been, and/or now is, due and/or owing from said defendant to plaintiffs, and admits that no part of said sum has been paid.

AND AS AND FOR A SECOND, SEPARATE, AND DISTINCT ANSWER AND DEFENSE to the allegations contained in said first cause of ac-

tion of said plaintiffs, defendant, Clarence W. Morris, alleges:

I.

That on or about the 13th day of April, 1931, in the City and County of San Francisco, State of California, the sum of Four Thousand Three Hundred Ninety-one and 84/100ths (\$4391.84) Dollars was paid to Barrett & Hilp in full payment of any claim or claims that the said Barrett & Hilp had or may have against the defendants herein, and that by said payment the said claim of the said Barrett & Hilp was fully paid, satisfied and discharged.

AND AS AND FOR A THIRD, SEPARATE AND DISTINCT ANSWER AND DEFENSE to the allegations contained in said first cause of action of said plaintiffs, defendant Clarence W. Morris alleges:

I.

That on or about the 18th day of October, 1930, defendant, Chester A. Morris, entered into a written contract with Barrett & Hilp for the construction of a miniature golf course on said property described in said complaint. That by a written endorsement of said contract executed contemporaneously therewith said defendant herein guaranteed the payment of any balance that may be due Barrett & Hilp and agreed to pay the same within seventy (70) days after completion of said contract. That on or about the 6th day of February, 1931, said Barrett & Hilp duly and regularly recorded in the

office of the Recorder of the City and County of San Francisco, its claim of lien against the real property described in said complaint, and thereafter, and on or about the 13th day of April, 1931, while said lien was in force and effect said plaintiffs paid said Barrett & Hilp a sum of money in full satisfaction and release of any claim or claims the said Barrett & Hilp may [13] have against defendants, or either of them, and said Barrett & Hilp fully satisfied, discharged and released the lien heretofore referred to. That by reason thereof, said defendant, Clarence W. Morris, as surety, was released and discharged from the payment of any sum or sums that may have been then due or owing to the said Barrett & Hilp.

AND AS AND FOR A FOURTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to the allegations contained in said first cause of action of said plaintiffs, defendant Charles W. Morris alleges:

I.

Said defendant alleges that said sum of Five Thousand Six Hundred Forty One and 84/100ths (\$5641.84) Dollars was and is not the reasonable value of said labor, work and materials alleged to have been performed by said Barrett & Hilp.

Now comes the defendant, Clarence W. Morris, and answering the Second and Separate cause of action set forth in Plaintiffs' complaint, admits, denies and avers, as follows:



## I.

Said defendant hereby refers to and repeats and makes a part hereof the same as if herein fully set forth at length herein, each and all and every of the denials, admissions and allegations contained in Paragraphs I, II, III, IV, V and VI of defendant Clarence W. Morris's answer to the first cause of action.

## II.

Said defendant denies that on or about the 18th day of February, 1931, or at any other time, or at all, Barrett & Hilp, by an instrument in writing, duly, or in any other manner, transferred, assigned and/or set over to plaintiffs for the sum of Four Thousand Three Hundred Ninety One and 84/100ths (\$4391.84) Dollars, or any other sum, any and/or all of their right, title and/or interest in or to that alleged contract with defendants herein, and said sum or any sums alleged to be owing thereunder.

## III.

Said defendant denies that by reason of the alleged or any premises, that on or about the 13th day of April, 1931, the [14] sum of Four Thousand Three Hundred Ninety One and 84/100ths (\$4391.84) Dollars, or any other sum, became and/or ever since has been and/or now is due, owing and/or unpaid from this defendant to said plaintiffs, or either of them.

AND AS AND FOR A SECOND, SEPARATE AND DISTINCT ANSWER AND DEFENSE to said second cause of action, said defendant, Clarence W. Morris, admits, denies and avers, as follows:

I.

That on or about the 13th day of April, 1931, in the City and County of San Francisco, State of California, the sum of Four Thousand Three Hundred Ninety One and 84/100ths (\$4391.84) Dollars was paid to Barrett & Hilp in full payment of any claim or claims that the said Barrett & Hilp had or may have against the defendant herein, and that by said payment the said claim of said Barrett & Hilp was fully paid, satisfied and discharged.

AND AS AND FOR A THIRD, SEPARATE AND DISTINCT ANSWER AND DEFENSE to said second cause of action, said defendant, Clarence W. Morris, admits, denies and avers, as follows:

That on or about the 18th day of October, 1930, defendant, Chester A. Morris, entered into a written contract with Barrett & Hilp for the construction of a miniature golf course on said property described in said complaint. That by a written endorsement of said contract executed contemporaneously therewith said defendant herein guaranteed the payment of any balance that may be due Barrett & Hilp and agreed to pay the same within seventy (70) days after completion of said contract.

That on or about the 6th day of February, 1931, said Barrett & Hilp duly and regularly recorded in the office of the Recorder of the City and County of San Francisco, its claim of lien against the real property described in said complaint, and thereafter, and on or about the 13th day of April, 1931, while said lien was in force and effect said plaintiffs paid said Barrett & Hilp a sum of money in full satisfaction and release of any claim or claims the said Barrett [15] & Hilp had or may have against defendants, or either of them, and said Barrett & Hilp fully satisfied, discharged and released the lien heretofore referred to. That by reason thereof, said defendant, Clarence W. Morris, a surety, was released and discharged from the payment of any sum or sums that may have been then due or owing to the said Barrett & Hilp.

AND AS AND FOR A FOURTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to said second cause of action, said defendant, Clarence W. Morris, admits, denies and avers, as follows:

I.

That said defendant alleges that said sum of Five Thousand Six Hundred Forty One and 84/100ths (\$5641.84) Dollars was and is not the reasonable value of said labor, work and materials alleged to have been performed by said Barrett & Hilp.

AND AS AND FOR A FIFTH, SEPARATE AND DISTINCT ANSWER AND DEFENSE to

said second cause of action, said defendant, Clarence W. Morris, admits, denies and avers, as follows:

I.

Said defendant avers that the plaintiffs herein are not now, nor were they on the 4th day of June, 1931, nor at any time, or at all, the owners of the claim herein sued upon and/or the indebtedness represented thereby.

WHEREFORE, said defendant, Clarence W. Morris, prays that plaintiffs take nothing by their action and that he be hence dismissed with his costs of suit herein.

HAROLD J. ABRAHAM and  
 JESSE W. MUELLER,  
 Attorneys for said Defendant. [16]

State of California,  
 City and County of San Francisco.—ss.

Clarence W. Morris, being first duly sworn, according to law, deposes and says:

My name is Clarence W. Morris, and I am the defendant named in the foregoing answer. I have read said answer and I know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated on information or belief, and as to those matters, I believe it to be true.

CLARENCE W. MORRIS.

Subscribed and sworn to before me this 25th day of August, 1931.

[Seal]

MARK E. LEVY,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within answer is admitted this 25th day of Aug., 1931.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 25, 1931. [17]

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[Title of Court and Cause.]

STIPULATION AND AGREED  
STATEMENT OF FACTS.

It is hereby stipulated by and between the parties to the above entitled action that the facts hereinafter set forth are true, and may be considered upon the trial of the said action or upon any appeal or other proceeding herein, subject, however, to any legal objection or objections which any party may interpose in the manner hereinafter provided, to the competency, relevancy or materiality in law of such facts or any thereof. Any such legal objection or objections shall be made in the brief or briefs of the party objecting.

It is further stipulated that no evidence shall be offered or given by any party other than that set forth in said agreed statement of facts and that this

cause may be forthwith submitted to the honorable, the above entitled Court, for decision upon the pleadings and said agreed statement of facts; said agreed statement of facts being as follows: [18]

### AGREED STATEMENT OF FACTS.

At all times herein mentioned each of the plaintiffs was and is now a citizen and resident of the State of Texas. At all times herein mentioned each of the defendants, Chester A. Morris and Clarence W. Morris, was and is now a citizen of the State of California and a resident of the Southern Division of the Northern District thereof.

This is a suit of a civil nature at law. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000. and is between citizens of different states.

Plaintiffs were at all times herein mentioned and are now the owners of certain real property in the City and County of San Francisco, State of California, and more particularly described as follows, to-wit:

Lots twenty (20), twenty-one (21), twenty-two (22) and twenty-three (23), Block 3012, West Portal Park, according to the map thereof recorded in the office of the Recorder of the City and County of San Francisco, State of California.

On or about November 1, 1930, plaintiffs, by Harry L. Hussman, and defendant Chester A.

Morris entered into a certain lease of said premises, a copy of which is attached to the complaint on file herein and marked Exhibit "A", and is hereby referred to and made a part hereof. Said lease, among other things, provided that defendant Chester A. Morris would construct a miniature golf course on said premises. Defendant Chester A. Morris entered into a written contract dated October 18, 1930, with Barrett & Hilp, contractors, a copy of which is hereto attached, marked Exhibit "B" and made a part hereof, for the construction of such miniature golf course, on the terms and [19] conditions therein set forth. The written endorsement on said contract signed by defendant Clarence W. Morris was executed contemporaneously with said contract. The assignment dated April 13, 1931, endorsed on said contract was executed subsequently, as is later set forth in this agreed statement of facts.

Barrett & Hilp duly erected said miniature golf course on the above described property, pursuant to said contract and duly performed all the terms and conditions of said contract on the part of said Barrett & Hilp to be performed, whereupon there became due and owing to Barrett & Hilp under said contract the sum of \$5641.84, which sum was both the reasonable value and the agreed price under said contract for the said work done by said Barrett & Hilp. Defendants paid to Barrett & Hilp the sum of \$1250. but they and each of them, notwithstanding the demand of said Barrett & Hilp on them and each of them, have failed and refused to pay any

part of the balance of said contract price, to-wit: the sum of \$4391.84. Thereafter and within the time allowed by law, to-wit: on or about February 6, 1931, said Barrett & Hilp recorded in the office of the Recorder of the City and County of San Francisco their claim of lien against the above described real property, which notice contained a statement of the demand of said Barrett & Hilp after the deduction of just credits and offsets, the name of the owner of the property, a general statement of the kind of work done and materials furnished, the name of the person by whom said Barrett & Hilp was employed and the names of the persons to whom the materials were furnished, a description of the property sought to be charged with the lien sufficient for identification, which claim of lien was verified by oath of J. F. Barrett, one of the partners of said Barrett & Hilp, copy of which is attached hereto, marked Exhibit "C" and made a part hereof. [20]

On or about March 1, 1931, Barrett & Hilp, by J. F. Barrett, assigned to Credit Clearance Bureau all its right, title and interest in and to said claim against defendants and each of them, and in and to said lien and claim of lien. Thereafter, and on March 17, 1931, said Credit Clearance Bureau filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, for foreclosure of said lien against said real property and for the recovery from the defendants herein of any deficiency up to said sum of \$4391.84, together with interest and costs. Said action was



numbered 226,541 in the records of said court, a copy of which is attached hereto, marked Exhibit "D" and made a part hereof.

Defendants at all times failed and refused to pay any part of said sum of \$4391.84 and plaintiffs on or about April 13, 1931, for the sole purpose of protecting their property against foreclosure of said lien, paid Credit Clearance Bureau said sum of \$4391.84.

On or about April 13, 1931, Credit Clearance Bureau assigned to plaintiffs its claim against defendants and each of them, and at the same time delivered to plaintiffs that certain counterpart or duplicate of said contract dated October 18, 1930, which had been retained by said Barrett & Hilp, and of which exhibit "B" is a copy. Contemporaneously with the delivery to plaintiffs of said contract, exhibit "B", and with the knowledge and consent of said Credit Clearance Bureau, the names of plaintiffs, Harry L. Hussman and Caroline Hussman were written into the blank space in the assignment dated April 13, 1931, which is endorsed on said contract, exhibit "B". At the same time Credit Clearance Bureau delivered to plaintiffs a dismissal of said action No. 226,541, of which the following is a copy: [21]

“IN THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA, IN AND  
FOR THE CITY AND COUNTY OF  
SAN FRANCISCO.

No. 226,541

CREDIT CLEARANCE BUREAU,  
Plaintiff,

vs.

CHESTER A. MORRIS, et al.,  
Defendants.

DISMISSAL.

To the Clerk of the above entitled Court:

The above entitled action is hereby dismissed and you are hereby authorized and directed to enter such dismissal of record herein.

Dated, April 8th, 1931.

PAUL F. FRATESSA,  
Attorney for Plaintiff.”

By reason of the premises plaintiffs claim that said sum of \$4391.84 became on or about April 13, 1931, ever since has been, and now is, due, owing and unpaid from said defendants to said plaintiffs; that no part of said sum has been paid, and plaintiffs claim that the whole thereof, plus legal interest has been ever since April 13, 1931, and now is, due, owing and unpaid from said defendants to said plaintiffs.

Dated, February 18th, 1932.

PILLSBURY, MADISON & SUTRO,  
Attorneys for Plaintiffs.

JESSE A. MUELLER and  
HAROLD ABRAHAM,

Attorneys for Defendant  
Clarence W. Morris. [22]

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EXHIBIT "B".

AGREEMENT.

THIS AGREEMENT, made this 18th day of October, 1930, by and between CHESTER A. MORRIS, hereinafter designated as the Owner, and BARRETT & HILP, a copartnership, consisting of J. F. BARRETT and H. H. HILP, hereinafter designated as the Constructors.

WITNESSETH:

WHEREAS the Owner intends to erect a Miniature Golf Course building upon that certain lot of land situated in the City and County of San Francisco, State of California, and more particularly described as follows: Easterly of West Portal 50 feet South of 14th Avenue, 90 x 200.

And desires to employ the Constructors to superintend and manage the construction of said building for the Owner upon the terms and conditions herein designated, and the Constructors do hereby accept such employment;

NOW, THEREFORE, the parties hereto further agree to the following:

### PLANS.

1. Said building is to be constructed in accordance with plans and specifications attached hereto and made a part hereof, which were prepared for the Owner by \_\_\_\_\_ hereinafter called the Architect. Wherever the word "Contractor" occurs in said plans and specifications, it is to be understood to mean said Constructors.

### MANAGEMENT OF WORK.

2. The Constructors recognize the relation of trust and confidence established between them and the Owner by this Agreement. They covenant with the Owner to furnish their best skill and judgment and to cooperate with the Architect in forwarding the interest of the Owner. They agree to furnish efficient business administration and superintendence and to use every effort to keep upon the work at all times an adequate supply of workmen and materials, and to secure its execution in the best and soundest way and in the most expeditious and economical manner consistent with the interest of the Owner.

### MATERIALS AND LABOR.

3. Constructors are to procure all of the necessary materials and supplies required by said plans and specifications and in a workmanlike manner and

to the satisfaction of said Architect and Owner; maintain at all times during the progress of said work adequate and efficient workmen, machinery, tools and appliances; and also maintain an efficient business administration for the carrying on of said work to the satisfaction of said Architect and Owner.

#### INSURANCE.

4. Constructors will procure and maintain during the progress of said work, Workmen's Compensation and Public Liability Insurance for the protection of the Owner and themselves, against liability, damage or expense for injuries to person or property in carrying on of said work, premiums therefor being chargeable as [23] part of the cost of said work. In case said work herein provided for should, before completion, be wholly or partially destroyed by fire, defective soil, earthquake or other act of God, which the Constructors could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the Owner, and the Owner agrees to carry an insurance for the full amount of the labor and material as the work progresses, in the joint name of the Owner and Constructors. All moneys received under such policies are to be divided between the Owner and Constructors as their interests may appear.

#### PERMITS.

5. Constructors will procure all necessary permits for said work which may be required by law.

**COMMENCEMENT OF WORK.**

6. Work shall commence within ten days after the execution of this agreement and shall be completed within ..... working days.

**RECORDS.**

7. Complete and accurate records and books of account in form satisfactory to the Owner, of all contracts, subcontracts, commitments, and purchases pertaining to the carrying out of this agreement shall be open to the inspection and check of the Owner, or its authorized representative, at all reasonable times.

**CHARGE FOR EQUIPMENT.**

9. Constructors will charge in, and as part of the cost of said work, for the use of any machinery, apparatus or appliances furnished for use in said work by Constructors from their own equipment or plant in accordance with the following schedule:

RENTAL SCHEDULE ON EQUIPMENT AND TOOLS OWNED  
BY BARRETT & HILP.

(This schedule applies to equipment while on the job. Maintenance and operating expenses are extra.)

|   |         |                            |      |
|---|---------|----------------------------|------|
| Acetylene Burner .....                                | \$ 2.50 | per hr. without man or air |      |
| Acetylene Burner .....                                | 4.00    | per hr. with man and air   |      |
| Bar Benders .....                                     | 2.00    | per month                  |      |
| Bar Cutters (to take 1 $\frac{1}{8}$ " sq. bar) ..... | 10.00   | " "                        |      |
| Bending Table .....                                   | 10.00   | " "                        |      |
| Blocks for underpinning .....                         | .15     | " day                      |      |
| Buggies, concrete .....                               | 5.00    | " month                    |      |
| Bunker Gates .....                                    | .50     | " "                        |      |
| Compressor with tractor .....                         | 2.50    | " hour                     |      |
| 10-ft. Concrete Mixer with engine .....               | 75.00   | " month or \$10 per day    |      |
| 21-ft. Concrete Mixer with engine .....               | 150.00  | " month or \$10 per day    |      |
| Crane .....   | 4.00    | " hour                     |      |
| Electric Drills, including drills .....               | 5.00    | " day                      |      |
| Electric Hammer without drills .....                  | 20.00   | " month                    |      |
| Hoist, gas and engine .....                           | 65.00   | " "                        |      |
| Hoist, steam .....                                    | 85.00   | " "                        |      |
| Hoisting tower head and sheaves .....                 | 5.00    | " "                        |      |
| Hopper, concrete and skip .....                       | 10.00   | " "                        | [24] |
| House Jacks .....                                     | \$ 0.25 | per day                    |      |
| Inundator .....                                       | 100.00  | " month                    |      |
| Level and Tripod .....                                | 15.00   | " "                        |      |
| Lock Mortiser .....                                   | 20.00   | " "                        |      |
| Lumber Dollies .....                                  | .50     | " "                        |      |
| Patent Jacking Device .....                           | .50     | " "                        |      |
| Power Saw and Table, without motor.....               | 15.00   | " "                        |      |
| Power Saw and Table, with motor .....                 | 25.00   | " "                        |      |

|                                 |       |                |
|---------------------------------|-------|----------------|
| Power Saw with tractor .....    | 45.00 | per month      |
| Pump, Hand .....                | .50   | “ day          |
| Runways .....                   | .40   | “ month        |
| Sanding Machine .....           | 5.00  | “ day          |
| Shore Clamps .....              | .25   | each per month |
| Shores, Patent (Rooshors) ..... | .40   | per month      |
| Stirrup Benders .....           | 2.00  | “ “            |
| Tarpaulin .....                 | 2.50  | “ “            |
| Tractor for hoisting .....      | 5.00  | “ day          |
| Trench Digger .....             | 10.00 | “ month        |
| Wheelbarrows .....              | 2.50  | “ “            |

Machinery, apparatus or appliances furnished and not hereinabove specifically mentioned shall be furnished at the current rental prices therefor at said time in San Francisco. Cartage, hauling and draying supplied by Constructors shall be charged for at the current rates therefor prevailing in San Francisco at said time.

The actual cost of small equipment furnished for use in said work, such as hand tools, shall be chargeable as part of the cost of said work.

The equipment rental charge shall include and cover payment for the service of each piece of equipment except special equipment which the Constructors may use to execute the work, provided said equipment shall be installed upon the work in good operative condition as certified by a competent inspector selected by the Owner.

Owner's written approval must be obtained before any special equipment is purchased.



The amount of the payment for any piece of the equipment furnished by the Constructors, except special equipment, shall be the daily rental rate herein specified for that piece of equipment, multiplied by the number of days elapsing between the date of loading that piece of equipment for transit to the site and the date of reloading it for transit from the site. Equipment shall not be shipped to the work until required and shall be taken from the work as soon as the work to be performed by such equipment has been completed.

Any special equipment not owned by the Constructors which they may require to purchase to execute the work shall be paid for by the Owner, and on completion of the work all such special equipment shall be sold and the proceeds thereof credited to the Owner.

All equipment taken on the work shall be in good repair and necessary repairs to the equipment, caused by usage on the work, shall be paid as a cost of the work. [25]

## DUTIES OF CONSTRUCTORS.

10. It shall be the duty of the Constructors to provide: (a) The services of the members of the firm of the Constructors who will direct and oversee the work provided for in this contract; (b) The services of the purchasing department of the Constructors who will assist in the purchasing of materials, destructible equipment and the subletting of contracts; (c) The services of the accounting and

auditing departments of the Constructors; (d) The expenses of the San Francisco office of the Constructors, including the necessary stationery and standard forms and orders used upon the work.

All of the services mentioned in this paragraph shall be furnished by the Constructors free and clear of all expense and charge to the Owner, and shall not be included as part of the cost of the buildings. The Constructors are, however, to be reimbursed for the actual time of their general superintendent of the work.

It is expressly understood that the listing of reinforcing steel shall be included in the cost of the buildings.

It is the intent of the parties hereto that the Constructors shall do the necessary form and concrete work and such work as Owner may direct, but the Owner shall enter into all subcontracts for plumbing, wiring, painting etc., and assume all liability in connection therewith.

#### LIENS.

11. Constructors agree to keep the Owner free and harmless from any liens on account of labor and materials furnished said building, provided the owner makes the payments as required by this Agreement.

#### CONFLICT IN SPECIFICATIONS.

12. The specifications and drawings are intended to cooperate, so that any work exhibited in the

drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together. But no part of said specifications that is in conflict with any portion of this Agreement, or that is not actually descriptive of the work to be done thereunder, or of the manner in which said work is to be executed shall be considered as any part of this Agreement, but shall be utterly null and void, and anything that is expressly stated, delineated or shown in or upon the specifications or drawings shall govern and be followed notwithstanding anything to the contrary in any other source of information or authority to which reference may be made.

#### MODIFICATION OF PLANS.

13. Should the Owner or Architect, at any time during the progress of the work, request any alterations or deviations in, additions to, or omissions from, this contract or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way effect or make void this contract. And this contract shall be held to be completed when the work [26] is finished in accordance with the original plans, as amended by such changes, whatever may be the nature or extent thereof. No such change or modification shall release or exonerate any surety or sureties upon any guaranty

or bond given in connection with this contract, and it shall be so stated in any such guaranty or bond.

#### TERMINATION OF CONTRACT.

14. Should the Constructors, at any time during the progress of the work, refuse or neglect, without fault of the Owner, or Architect, to supply a sufficiency of materials or workmen to complete the contract after having been notified by the Owner in writing to furnish the same, or should the Owner at any time decide to abandon the work for any reason, the Owner shall have the power, after serving a ten-day written notice to Constructors, to terminate this contract or to furnish and provide said materials or workmen to finish said work, provided, however, that in the event of the termination of this contract the Constructors are to be paid the amount of fee earned by them up to the date of said termination.

#### CHANGES IN PLANS.

15. No changes from the plans and specifications mentioned herein shall be made without the consent of the Owner and Architect in writing.

#### SUBCONTRACTORS.

16. All subcontractors to be invited to submit bids for their respective work are first to be approved of by the Owner before bids are to be received from them or before any work is let to them.

## DETAILS AND DRAWINGS.

17. The Architect shall furnish with reasonable promptness additional instructions by means of drawings or otherwise necessary for the proper execution of the work. The work shall be executed in conformity therewith and the Constructors shall do no work without proper drawings and instructions.

Constructors and Architect, if either so request, shall jointly prepare a schedule, subject to change from time to time, in accordance with the progress of the work, fixing the dates at which the various detail drawings will be required.

## DRAWINGS AND SPECIFICATIONS ON THE WORK.

18. Constructors shall keep one copy of all drawings and specifications on the work in good order, available to the Architect and to his representatives.

19. Constructors shall furnish for approval all samples as directed and the work shall be in accordance with approved samples.

## INSPECTION OF WORK.

20. The Architect and representatives and Owner shall at all times have access to the work wherever it is in preparation or progress and the Constructors shall provide proper facilities for such inspection. [27]

**CONSTRUCTORS' RIGHT TO STOP WORK.**

21. If the work should be stopped under an order of any Court, or public authority, for a period of three months, through no act or fault of the Constructors, or of anyone employed by them, or if the Architect should fail to issue any certificate for payment within seven days after it is due, or if the Owner should fail to pay the Constructors within seven days after presentation, any sum certified by the Architect, then the Constructors may, upon seven days' written notice to the Owner, stop work or terminate this contract and recover from the Owner payment for all work executed and any loss sustained upon any plant or materials together with the accrued fees.

**GUARANTEED COST.****COMPENSATION OF CONSTRUCTORS.**

23. The Owner agrees to pay the Constructors the sum of Five Hundred (\$500.00) Dollars in full payment of their services contemplated by this Agreement plus the cost of all labor and materials incorporated in the work by the Constructors upon the completion and acceptance of said course.

**METHOD OF PAYMENT.**

24. The Owner agrees to advance to the Constructors, upon the execution of this agreement, the sum of Twelve Hundred and Fifty (\$1250) Dollars.

ARBITRATION.

25. All disputes arising under this contract shall be submitted to arbitration at the request of either the Owner or Constructors, except the Architect's decision in matters relating to artistic effect shall be final, if within the terms of this agreement.

25A. Wherever the word "building" appears in the agreement, it is understood to mean "golf course."

COMPLETION CERTIFICATE.

26. Upon the completion of said work Constructors shall deliver to the Owner a detailed statement of the cost of construction of said building accompanied with all pay rolls and vouchers not previously furnished to the Owner, showing that the Owner promises to immediately pay the Constructors the balance due within 70 days thereafter.

IN WITNESS WHEREOF the Owner and the Constructors have hereunto set their hands the day and year first above written.

Executed in triplicate.

CHESTER A. MORRIS,  
Owner.

BARRETT & HILP,  
By J. F. BARRETT,  
Constructors.

I hereby guarantee the payment of any balance that may be due Barrett & Hilp and agree to pay

the same within 70 days after completion of said golf course.

CLARENCE W. MORRIS. [28]

For and in consideration of the sum of \$4391.84, receipt of which is hereby acknowledged, we hereby sell, assign, and transfer all of our right, title and interest in and to the within contract unto Harry L. Hussman and Caroline Hussman together with the right to recover against either Chester A. Morris, and or Clarence W. Morris.

Dated, April 13, 1931.

BARRETT & HILP,  
By J. F. BARRETT.

Witness

PAUL F. FRATESSA. [29]

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EXHIBIT "C"

MECHANICS' LIEN.

NOTICE IS HEREBY GIVEN that BARRETT & HILP, a co-partnership consisting of J. F. Barrett and H. H. Hilp, claim a lien upon that certain lot, piece or parcel of land situate, lying and being in the City and County of San Francisco, State of California, and bounded and described as follows, to-wit:

Lots 20, 21, 22 and 23, Block 3012 West Portal Park according to map thereof recorded in the office of the Recorder of the City and



County of San Francisco, State of California.

Claimant's demand after deducting all just credits and offsets is \$4391.84.

The name of the owners and reputed owners of said land are Harry L. Hussman and Caroline L. Hussman.

That the names of the persons to whom the work and materials specified furnished by claimant are Chester A. Morris, C. V. Haley and Clarence Morris.

The kind of work done and material furnished by claimant are as follows:

Claimant furnished the materials and performed the labor in the construction of a miniature golf course upon said lot of land which said labor and material were actually used in the construction of said golf course.

Said Barrett & Hilp were employed by, and said materials and labor were furnished to Chester A. Morris, C. V. Haley and Clarence Morris.

Claimant, therefore, claims a lien upon all of said land and premises above described by virtue of Part 3, Title 4, Chapter 2 of the Code of Civil Procedure of the State of California for the sum of \$4391.84.

Dated, February 5th, 1931.

BARRETT & HILP,

By J. F. BARRETT,

Claimant.

State of California,  
City and County of San Francisco.—ss.

J. F. Barrett, being first duly sworn, deposes and says: That he is one of the partners of Barrett & Hilp, a co-partnership, and he makes this verification for and on behalf of said Barrett & Hilp, a co-partnership; that he has read said claim of lien, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

J. F. BARRETT.

Subscribed and sworn to before me this 6th day of February, 1931.

[Seal] KATHERINE T. McDONNELL,  
Notary Public in and for the City and County  
of San Francisco, State of California. [30]

For value received, the undersigned does hereby sell, assign, transfer and set over unto Credit Clearance Bureau, all of its right, title and interest in and to the within lien and claim of lien.

Dated, March 1st, 1931.

BARRETT & HILP,  
By J. F. BARRETT.

[Endorsed]: F40746.

MECHANICS' LIEN.

BARRETT & HILP,

Plaintiff,

vs.

HARRY L. HUSSMAN, CAROLINE L. HUSS-  
MAN, CHESTER A. MORRIS, CLARENCE  
MORRIS, C. V. HALEY,

Defendants.

Dated, February 5th, 1931.

Recorded at request of BARRETT & HILP at  
6 min. past 12 M. Feb. 6, 1931. 2166 Official Rec-  
ords, p. 31. City and County of San Francisco,  
California.

EDMOND GODCHAUX, Recorder,  
J. WHITMAN, Deputy. [31]

## EXHIBIT "D"

In the Superior Court of the State of California,  
in and for the City and County of San Fran-  
cisco.

CREDIT CLEARANCE BUREAU,  
Plaintiff,

vs.

CHESTER A. MORRIS, C. V. HALEY, CLAR-  
ENCE MORRIS, HARRY L. HUSSMAN  
and CAROLINE HUSSMAN, FIRST DOE,  
SECOND DOE and THIRD DOE,  
Defendants.

COMPLAINT TO FORECLOSE MECHANICS'  
LIEN.

Plaintiff complains of defendants and for cause  
of action alleges:

I.

That plaintiff is now and at all the times herein  
mentioned has been a corporation duly organized  
and existing under and by virtue of the laws of  
the State of California, and having its office and  
principal place of business in the City and County  
of San Francisco, State of California.

II.

That defendants Harry L. Hussman and Caroline  
L. Hussman are now and at all the times herein  
mentioned have been the owners and reputed own-  
ers of that certain lot, piece or parcel of land

situate, lying and being in the City and County of San Francisco, State of California, and particularly described as follows, to-wit:

Lots 20, 21, 22 and 23, Block 3012 West Portal Park according to map thereof recorded in the office of the Recorder of the City and County of San Francisco, State of California.

[32]

That all of said land is required for the convenience, use and occupation of the improvement thereon in the construction of which the materials were furnished by Barrett & Hilp, as hereinafter set forth.

### III.

That defendants Chester A. Morris, C. V. Haley and Clarence Morris are the names of the persons to whom and for whom Barrett & Hilp furnished the materials and by whom it was employed for which this lien is claimed.

### IV.

That during the course of the construction of said improvement, Chester Morris, C. V. Haley and Clarence Morris, acting for themselves and as agent of said owners, entered into an agreement with Barrett & Hilp, wherein and whereby said Barrett & Hilp agreed to furnish certain labor and materials, as follows, to-wit: all labor and materials to be used in the construction of said improvement at the reasonable market value of said labor and materials.

That the reasonable market value of said labor and materials at the time the same were furnished was and still is the sum of \$5641.84; that defendants Chester Morris, C. V. Haley and Clarence Morris agreed to pay for said labor and materials upon delivery of the same.

That the total price agreed upon between said defendants Chester A. Morris, C. V. Haley and Clarence Morris and said Barrett & Hilp for the furnishing of said labor and materials was and is the sum of \$5641.84, no part of which said sum has been paid, except the sum of \$1250.00, and that there is now due, owing, unpaid and payable to said Barrett & Hilp the sum of \$4391.84.

That said Barrett & Hilp have fully kept and performed all of [33] the terms and conditions of its said contract and furnished all of the labor and materials to be furnished by it and all of said labor and materials were furnished to be used and were actually used in the construction of said improvement upon said land and premises.

## V.

That no Notice of Completion of said improvement has been filed for record. That work on said improvement ceased and said improvement was completed on or about November 15, 1930. That thereafter, to-wit, on February 6, 1931, and within 90 days after the said completion the said Barrett & Hilp filed for record in the office of the County Recorder of the City and County of San Francisco,

State of California, its claim of lien against said premises, which said claim of lien contained a statement of its demand after deducting all just credits and offsets, with the name of the owners and reputed owners of said premises, and a general statement of the kind of work done and materials furnished by said Barrett & Hilp; the names of the persons by whom it was employed and to whom it furnished said materials, and a description of the premises sought to be charged by said lien sufficient for identification, which claim of lien was duly verified by oath of J. F. Barrett, one of the partners of said Barrett & Hilp, and that said claim of lien was duly recorded in Volume 2166 of Official Records, at page 31, in said Recorder's office.

That said Barrett & Hilp expended as necessary costs of verifying and recording said lien the sum of \$1.90, no part of which said sum has been paid.

## VI.

That the true names of the defendants sued herein as First [34] Doe, Second Doe and Third Doe are unknown to plaintiff; that said names are fictitious and plaintiff asks that when the true names of said defendants are ascertained they may be inserted herein together with all necessary allegations to charge them. That said last named defendants and defendants Chester A. Morris, C. V. Haley and Clarence Morris so and each of them does claim to have some right, title or interest in or to said parcel of real property above described, the exact nature

of which said claims are unknown to plaintiff, but whatever said claims may be they are subsequent and subordinate to the right of plaintiff herein.

## VII.

That heretofore and prior to the commencement of the above entitled action said Barrett & Hilp, sold, assigned, transferred and set over to plaintiff its claim against said defendants and its said claim of lien and all its rights thereunder.

## VIII.

That said Barrett & Hilp are now and at all times herein mentioned has been a copartnership consisting of J. F. Barrett and H. H. Hilp, having its office and principal place of business in the City and County of San Francisco, State of California; that a certificate stating the names in full and the places of residence of each of the partners of said Barrett & Hilp was heretofore duly filed in the office of the County Clerk of said City and County, and published once a week for four successive weeks in a newspaper of general circulation printed and published in said City and County.

WHEREFORE, plaintiff prays judgment against the said defendants for the sum of \$4391.84, together with interest thereon at the rate of 7% per annum from the 6th day of February, 1931, [35] for the sum of \$1.90 expended in verifying and recording said claim of lien and for costs of suit



herein; that said sum so found due to plaintiff be declared to be a lien upon said described property.

That said lien be foreclosed and that said property be sold in the manner prescribed by law and the proceeds of said sale be applied to the payment of said sums so found due to plaintiff; that plaintiff have judgment against defendants for any deficiency that may exist after so applying the proceeds of said sale; that any party to this action may become a purchaser at said sale; and for such other and further relief as may be meet and just in the premises.

PAUL F. FRATESSA,  
Attorney for Plaintiff.

State of California,  
City and County of San Francisco.—ss.

Paul F. Fratessa, being first duly sworn, deposes and says:

That he is an officer of the Credit Clearance Bureau, plaintiff herein, to-wit: The secretary thereof; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

PAUL F. FRATESSA.

Subscribed and sworn to before me this ..... day of March, 1931.

[Seal]      KATHERINE T. McDONNELL,  
Notary Public in and for the City and County  
of San Francisco, State of California.

[Endorsed]: Filed Feb. 18, 1932. [36]

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In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. 18,975-L

HARRY L. HUSSMAN and CAROLINE HUSS-  
MAN,

Plaintiff,

vs.

CHESTER A. MORRIS and CLARENCE W.  
MORRIS,

Defendants.

### JUDGMENT.

This cause having come on regularly for trial on the 19th day of February, 1932, before the Court sitting without a Jury, a trial by Jury having been waived by written stipulation filed; Pillsbury, Madison and Sutro, Esquires, appearing as attorneys for plaintiffs, and Jesse Mueller and Harold Abraham, Esquires, appearing as attorneys for defendant, Clarence W. Morris, and the cause having been

submitted to the Court on an agreed statement of facts and briefs to be filed, and the Court, after due deliberation having rendered its decision and ordered that judgment be entered herein in favor of plaintiffs and against defendant, Clarence W. Morris, as prayed for the sum of Four thousand three hundred ninety-one and  $84/100$  (4,391.84) Dollars, together with interest thereon at the rate of seven per cent (7%) per annum from April 13, 1931, until paid, together with costs.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Harry L. Hussman and Caroline Hussman, plaintiffs, do have and recover of and from Clarence W. Morris, defendant, the sum of Four thousand three hundred ninety-one and  $84/100$  (4,391.84) Dollars, together with interest thereon at the rate of seven per cent (7%) per annum from April 13, 1931, until paid, together with their costs herein expended taxed at \$47.50.

Judgment entered this 23rd day of May, 1932.

WALTER B. MALING,

Clerk. [37]

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[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING  
APPEAL.

Considering himself aggrieved by the judgment herein rendered against him on the 24th day of

May, 1932, the defendant, Clarence W. Morris, hereby prays that an appeal may be allowed on his behalf to the Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors made in this cause to the prejudice of said defendant as more fully appears from the Assignment of Errors on file herein and that a citation may issue and a transcript of record be sent to said Honorable Circuit Court of Appeals;

WHEREFORE, your petitioner prays for said order allowing said appeal and that a bond to cover costs in said appeal be fixed by the above Honorable Court.

CLARENCE W. MORRIS,  
Petitioner.  
JESSE W. MUELLER,  
HAROLD J. ABRAHAM,  
Attorneys for Petitioner.

#### ORDER ALLOWING APPEAL.

Upon reading and filing the petition for an order allowing appeal in the above entitled cause, and

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the foregoing petition is granted and the appeal therein prayed for be allowed. The sum of 250 Dollars is hereby fixed [38] as the bond to be given to cover the costs thereof.

Dated, August 17th, 1932.

HAROLD LOUDERBACK,  
Judge of the U. S. Court.

[Endorsed]: Filed Aug. 19, 1932. [39]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS IN SUPPORT OF  
PETITION FOR APPEAL.

The defendant Clarence W. Morris having filed his petition for the allowance of an appeal in the above entitled action does hereby assign the following errors in the record and proceedings in said cause:

I.

The District Court erred in overruling the defendant Clarence W. Morris' demurrer to the complaint on file in this action in the following particulars:

(a) That said complaint on its face does not state facts sufficient to constitute a cause of action against said defendant in that said complaint affirmatively shows that the said defendant Clarence W. Morris, whether he was a guarantor or surety, is exonerated from payment of the amount sued for, because as a surety, such defendant was entitled to the benefit of the lien held by plaintiffs' assignor as security for the payment of the principal sum. When Barrett & Hilp, plaintiffs' assignor, was paid in full and the security which they held surrendered and destroyed, such surrender and destruction of said security released the defendant Clarence W. Morris from payment.

(b) That said complaint affirmatively shows on its face that Barrett & Hilp were not at the time of

the alleged assignment of the contract and guarantee, the owner of any claim or demand against Clarence W. Morris, and therefore the said Barrett & Hilp had nothing to assign to the plaintiffs. [40]

## II.

That the District Court erred in rendering a judgment in favor of the plaintiffs and against the defendant Clarence W. Morris in the following particulars:

(a) That the pleadings are not supported by the evidence in that Barrett & Hilp, a co-partnership, was not at the time of the alleged assignment of the contract and guarantee, the owner of any chose in action, claim or demand against defendant Clarence W. Morris, and therefore had nothing to assign to the plaintiffs upon which to maintain this action.

(b) That the statement of facts clearly demonstrates that the defendant Clarence W. Morris, whether as guarantor or surety, is exonerated from payment for the following reasons:

(1) That the principal obligation which he guaranteed or became surety for was fully paid, satisfied and discharged.

(2) That the said defendant Clarence W. Morris is exonerated from payment because the creditor, Barrett & Hilp, without the consent of the surety, Clarence W. Morris, altered the original obligation and impaired, destroyed and surrendered to others

other than said surety, the security which they held on the principal obligation.

PRAYER FOR REVERSAL.

For which errors said defendant prays that the judgment may be reversed with a direction to render judgment for defendant Clarence W. Morris.

HAROLD J. ABRAHAM,

JESSE W. MUELLER,

Attorneys for Appellant and Defendant, Clarence W. Morris.

[Endorsed]: Filed Aug. 19, 1932. [41]

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[Title of Court and Cause.]

UNDERTAKING FOR COSTS.

WHEREAS, Clarence W. Morris, defendant in the above-entitled action, has appealed or is about to appeal to the Circuit Court of Appeals from a judgment made and entered against said Clarence W. Morris, defendant in said action, in the District Court of the United States for the Northern District of California, in favor of the plaintiffs in said action on or about the 24th day of May, 1932.

NOW, THEREFORE, in consideration of the premises and of such appeal, the UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Mary-

land and by the laws of the State of California qualified and authorized to execute undertakings for costs, does hereby undertake and promise on the part of the appellant, that the said Appellant will pay all damages and costs which may be awarded against said appellant on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount it acknowledges itself bound.

The undersigned surety agrees that in case of any breach of any condition hereof the Court may, upon not less than ten days' notice to the undersigned, proceed summarily to ascertain the amount which the undersigned, as surety, is bound to pay on account of such breach, and render judgment against it and award execution therefor, not to exceed the sum specified in this undertaking.

IN WITNESS WHEREOF, the said UNITED STATES FIDELITY AND GUARANTY COMPANY HAS CAUSED THIS OBLIGATION TO BE SIGNED BY ITS DULY AUTHORIZED Attorney in Fact at San Francisco, California, and its corporate seal to be hereto affixed this 18th day of August, 1932.

[Seal]

UNITED STATES FIDELITY  
AND GUARANTY COMPANY,  
By BENA LUSSIER,

Attorney in Fact.



State of California,  
City and County of San Francisco—ss.

On this 19th day of August in the year one thousand nine hundred and thirty-two, before me, Paul Teilh, a Notary Public in and for the City and County of San Francisco, personally appeared Bena Lussier, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of United States Fidelity & Guaranty Company and acknowledged to me that he subscribed the name of United States Fidelity & Guaranty Company thereto as principal, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal]

PAUL TEILH,

Notary Public in and for the City and County  
of San Francisco, State of California.

Approved 8/22/32.

HAROLD LOUDERBACK,

District Judge.

The minimum charge on this bond is \$10.00 per annum.

[Endorsed]: Filed Aug. 22, 1932. [42]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the above entitled Court:

You will please prepare the transcript on appeal in the above entitled action, and include in said transcript the following documents and papers:

- 1—Complaint.
- 2—Demurrer to complaint.
- 3—Order overruling demurrer.
- 4—Answer to complaint.
- 5—Agreed statement of facts.
- 6—Judgment.
- 7—Petition for order allowing appeal.
- 8—Order allowing appeal.
- 9—Undertaking for costs on appeal.
- 10—Citation on appeal.
- 11—This praecipe.
- 12—Clerk's certificate.

Dated: August 26th, 1932.

HAROLD J. ABRAHAM,  
JESSE A. MUELLER,  
Attorneys for Defendant and Appellant,  
Clarence W. Morris.

Receipt of a copy of the within praecipe is hereby admitted this 26th day of August, 1932.

PILLSBURY, MADISON & SUTRO,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 29, 1932. [43]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 43 pages, numbered from 1 to 43, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Harry L. Hussman et al. vs. Chester A. Morris, et al., No. 18,975-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$8.35 and that the said amount has been paid to me by the Attorney for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A. D. 1932.

[Seal]

WALTER B. MALING,  
Clerk.

B. E. O'HARA,  
Deputy Clerk. [44]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America  
To Harry L. Hussman and Caroline Hussman and  
to Messrs. Pillsbury, Madison and Sutro, at-  
torneys for said Hussmans, GREETING:

YOU ARE HEREBY CITED AND ADMON-  
ISHED to be and appear at a United States Cir-  
cuit Court of Appeals for the Ninth Circuit, to be  
holden at the City of San Francisco, in the State  
of California, within thirty days from the date  
hereof, pursuant to an order allowing an appeal, of  
record in the Clerk's Office of the United States  
District Court for the Northern District of Cali-  
fornia, wherein Clarence W. Morris is appellant,  
and you are appellees, to show cause, if any there  
be, why the decree or judgment rendered against  
the said appellant, as in the said order allowing  
appeal mentioned, should not be corrected, and why  
speedy justice should not be done to the parties in  
that behalf.

WITNESS, the Honorable Harold Louderback,  
United States District Judge for the Northern Dis-  
trict of California, this 22nd day of August, A. D.  
1932.

[Seal]

HAROLD LOUDERBACK,  
United States District Judge.

Receipt of a copy of the within citation on appeal is hereby admitted this 22nd day of August, 1932.

PILLSBURY, MADISON & SUTRO,

Attorneys for Appellees.

[Endorsed]: Filed Aug. 25, 1932. [45]

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[Endorsed]: No. 7003. United States Circuit Court of Appeals for the Ninth Circuit. Clarence W. Morris, Appellant, vs. Harry L. Hussman and Caroline Hussman, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed Nov. 7, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Received Sept. 20, 1932. Paul P. O'Brien, Clerk.





